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COURT OF CRIMINAL APPEALS
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PD-0931-16

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
6/13/2017
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ANDREAS MARCOPOULOS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

On Appeal from Cause No. 1440970
In the 248th District of
Harris County, Texas

APPELLANT'S RESPONSE TO STATE'S REPLY TO MERITS BRIEF

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF INTERESTED PARTIES

Pursuant to TEX.R.APP.P. 28.1(a), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

Complainant, victim, or aggrieved party:
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Trial Judge:
Judge Katherine Cabiness
248th District Court
Harris County Texas

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STATEMENT OF THE CASE

Appellant incorporates by reference the Statement of the Case, Procedural History and Statement of Facts portions of his opening brief, and challenges all factual assertions made by the State in its brief.

This response brief and motion for leave is filed pursuant to TEX.R.APP.P. 70.4.

APPELLANT'S REPLY TO STATE'S RESPONSE TO FIRST GROUND FOR REVIEW

A. Appellant's Argument On The Merits

As an initial matter, the State misconstrues Appellant's argument in its merits brief.[1] Contrary to the State's contention, Appellant does not argue that this case presents **only** "furtive gestures" as a basis for the stop. If that were true, this case might easily be resolved by well-settled cases from this Court.[2] Instead, the facts in this case present "'furtive gestures' made by [Appellant] when he was being stopped by police, coupled with Officer Oliver's speculation about his purpose in going into a bar for three to five minutes and then leaving."[3]

The State furthers Appellant's actual argument in its brief when it observed that other "suspicious circumstances" combined with "furtive gestures" amounts to

[1] State's Reply Brief, hereinafter "RB", at 10.
[2] Appellant's Merits Brief, hereinafter "MB", at 12.
[3] MB at 8.

probable cause[4], however, the State failed to clarify that in *Wiede*, this Court made clear that the "suspicious circumstances" should connect the suspect to evidence of a crime.[5] In this case, it does not.

B. The Facts Are Stubborn Things

> "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence".
>
> -*John Adams*[6]

While the State's rendition of the facts works conveniently for its theory, it is not a fair interpretation of this record. Significantly, the importance of these facts cannot be understated since it is Appellant's contention that they resolve the issue presented. The difference between the State's version of events and those presented at trial make this case unique from those previously decided by this Court.[7]

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[4] RB at 10, citing *Wiede v. State*, 214 S.W.3d 17, 25-28 (Tex.Crim.App.2007).

[5] *Wiede*, 214 S.W.3d at 26, "The court of appeals correctly observed that this Court has held that there is nothing about a clear plastic bag that makes it inherently suspicious. The court of appeals also recognized, correctly, that [f]or a plastic bag to gain the significance attributed to it by the trial judge, there must be evidence that the seizing officer knew at the time of the search that drugs were commonly packaged in plastic bags and suspicious circumstances that would lead an officer believe that the bag contained drugs." (internal citations omitted).

[6] https://www.brainyquote.com/quotes/quotes/j/johnadams134175.html, last visited June 6, 2017.

[7] Wiede, 214 S. S.W.3d at 17.

1. Officer Oliver Did Not Testify To Any Pattern Of Narcotic Activity

Contrary to the State's argument, Officer Oliver never testified he observed a pattern of behavior whereby individuals would park, enter the bar for 3 to 5 minutes (presumably to buy drugs) and leave. In reality, Officer Oliver testified:

> Q. How long do you recall the defendant being inside the location?
>
> A. Around three minutes, three to five minutes.
>
> Q. What, if any, significance did the fact that he was in there three minutes have to you?
>
> **A. Usually somebody go [sic] into a bar to drink, anything like that, would stay in there long enough to have a drink.**[8]

Unlike the State's supposition of the facts, Officer Oliver never testified that he was familiar with a pattern of behavior whereby narcotics purchasers commonly parked at the bar, went in for a few minutes and then exited. So, too, the testimony offered by Officer Oliver does not lend itself to an inference that this was a common practice either since he testified to nothing more than his speculation that it was suspicious that Appellant entered and immediately left the bar, which, in his opinion, was an insufficient time to have a drink.

2. Officer Oliver's Testimony Does Not Support The Conclusion That Appellant Was A Repeat Narcotics "Customer"

Further, the State's contention that Officer Oliver testified that Appellant had been to the bar on numerous occasions is equally unavailing. While it could be

[8] 1 RR 9 (emphasis added).

inferred from his testimony that Officer Oliver had seen Appellant sometime in the past, it does not follow that he witnessed Appellant buy drugs on any prior occasion. In fact, that is not at all what he testified to at the hearing. The State contends that Officer Oliver's testimony was that Appellant "had been there multiple times, exhibiting behavior similar to that on the day of his arrest."[9] In fact, Officer Oliver's testimony about his interaction with the Appellant was limited to the following:

> Q. Now on September 10th of 2014, did you purchase at that location?
>
> A. No, ma'am.
>
> Q. Where were you -- well, how were you working there if you weren't inside?
>
> A. Just conducting surveillance on the outside, tried to **pick off customers** who'd just in and buy. **I'd purchased, I guess couple weeks, less than a month prior, done a search warrant on the place and we're just continuing the investigation by knocking cases out, proving that they were still doing it.**
>
> Q. So where you set up on that day?
>
> A. My partner and I were in an unmarked city of Houston vehicle and we were conducting surveillance from across the parking lot.
>
> Q. At some point did you see the defendant?
>
> A. Yes, ma'am.
>
> Q. I guess you would know him as Andreas Marcopoulos?

[9] RB at 11, fn.1.

A. Yes.

Q. So where did you see the defendant?

A. [On the day of his arrest] We saw him pull up in a white Chevrolet truck. We'd seen him at the location before, we couldn't get him to stop quick enough and get him out of there due to traffic or we couldn't enter in there. At this time when we seen him come back which we did, it was another customer we've seen at the location before. [10]

While Officer Oliver talks generally about "customers" as being there repeatedly, he never specifically identifies the Appellant being there **repeatedly** nor does he state Appellant had made a narcotic purchase on any prior occasion. In fact, and he provides little, if any, detail about his recollection of any prior encounter with the Appellant. Therefore, it is an unreasonable inference from Officer Oliver's testimony that the Appellant was repeatedly a "customer" at Diddy's Sports Bar because his testimony, while confusing, simply does not support it.

3. Officer Oliver's Testimony Does Not Support The Conclusion That The Place Was Actively Selling Narcotics

While, Officer Oliver testified that Diddy's Sports Bar did not sell anything but narcotics, he also stated that he "had not purchased cocaine out of there in an

[10] 1 RR 9.

undercover capacity" for a couple of weeks prior to the Appellant's arrest.[11] Officer Oliver testified that:

> A. We were working surveillance at Diddy's Sport's Bar off of Richmond.
>
> Q. Off of Richmond. What type of establishment is that?
>
> A It's a sports bar or it's set up like a sports bar but they don't sell anything other than narcotics out of there.
>
> Q. How do you know that?
>
> A. We investigated -- well, for about six years I [sic] been doing cases out of there and I personally purchased cocaine out of there in an undercover capacity.[12]

Specifically, Officer Oliver testified that he was continuing an investigation to prove the location was still selling narcotics.[13] Officer Oliver testified that on the day Appellant was arrested he was at the location to "pick off customers" who were there to buy narcotics.[14] He did not, however, testify that he had picked up anyone buying narcotics on that day. Therefore, the facts presented here do not support a conclusion that Appellant was at a location that was active for narcotic sales and in fact, had not been active, for several weeks.

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[11] 1 RR 18-24.
[12] Officer Oliver also testified that he had been working undercover for "[j]ust over six years," the same amount of time he testified to investigating Diddy's Sports Bar. 1 RR 7.
[13] 1 RR 18-24.
[14] 1 RR 8.

C. The Majority's Opinion

The State correctly observed that the majority's published opinion failed to address the search of Appellant's wallet in this case. Appellant further concedes that the court of appeals' opinion should have resolved this issue. Contrary to the State's argument, however, Appellant contends that the issue was properly raised in the trial court,[15] as well as presented on appeal[16]. For this reason, the State's argument that this issue has been waived is without merit.

So, too, the State accurately argues that the majority's published opinion also failed to resolve the claims raised by the parties and briefed in the lower court. Instead, the court of appeals resolved the unlawful search of his vehicle based on an automobile exception that was never briefed. For this reason, Appellant contends the proper remedy is to remand this case to the court of appeals to issue an opinion as to the unlawful search of Appellant's vehicle, not inconsistent with this Court's opinion.

CONCLUSION AND PRAYER

Appellant prays that the Court of Criminal Appeals, reverse and remand this cause to the court of appeals to issue an opinion not inconsistent with this Court's ruling or alternatively a new trial consistent with its ruling.

[15] 1 RR 44-45; 52.
[16] Appellant's Brief at 7, 17.

RESPECTFULLY SUBMITTED,

/s/ Carmen Roe

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CERTIFICATE OF SERVICE

The foregoing brief was served upon the Harris County District Attorney's Office, and State Prosecuting Attorney's Office by electronic filing on June 7, 2017.

/s/ Carmen Roe

_____

CARMEN ROE

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i), if applicable, because it contains **1,569** words, (maximum 2,400) excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Carmen Roe

CARMEN ROE